

STATE OF MISSOURI,

ex rel.

RICKY L. KIDD

Petitioner,

V.

Case No. 18DK-CC00017

SHERIE KORNEMAN,

Superintendent, Western

Missouri Correctional Center,

Respondent.

MOTION FOR RELEASE PENDING FURTHER PROCEEDINGS

Comes now Petitioner, by counsel, and moves this Court pursuant to Missouri Rule 91.14 to authorize his release from custody on his own recognizance pending further proceedings. For his motion, Petitioner states:

1. This Court on August 14, 2019, entered its order finding Mr. Kidd actually innocent of the crime for which he is incarcerated, and ordered “the State of Missouri to discharge Kidd unless he is brought to trial within 30 days of this order.” Findings of Fact, Conclusions of Law and Judgment Granting the Writ of Habeas Corpus, p. 107.

2. This Court’s judgment rests upon a determination that Mr. Kidd established his innocence “by clear and convincing evidence.” *Id.*, p. 107. This finding is amply supported by the record because the state’s evidence is weak or

recanted, no physical evidence links Mr. Kidd to the offense, and there is substantial affirmative evidence that he is completely innocent of the charges. Further, this Court found, “The evidence in this case is comparable to the evidence in Amrine, where the record established that “no credible evidence remains from the first trial to support the conviction.” Findings of Fact and Conclusions of Law, 107.

4. Missouri Rule 91.14 provides, “If the person for whose relief a writ of habeas corpus has been issued is charged with a bailable offense, the court in which the answer is to be filed *shall set conditions of release* pursuant to Rule 33.” (Emphasis added).

5. Missouri Rule 33.01 (a), revised effective July 1, 2019, provides that “Any person charged with a bailable offense *shall be entitled to be released* pending trial or other stage of the criminal proceedings.” (Emphasis added). The newly revised Rule 33.01 strengthens the presumption that the defendant shall be released on his written promise to appear, subject to standard conditions set out in Rule 33.03(b):

The court *shall release the defendant on the defendant's own recognizance subject only to the conditions under subsection (b)* with no additional conditions of release unless the court determines such release will not secure the appearance of the defendant at trial, or at any other stage of the criminal proceedings, or the safety of the community or other person, including but not limited to the crime victims and witnesses. If the court so determines, it shall set and impose additional conditions of release pursuant to this subsection.

Rule 33.01 (c) (emphasis added).

6. The revised Rule 33 contemplates bail conditions that support a decision to release the defendant on his own recognizance. In determining the terms and conditions of a defendant's bail:

The court shall set and impose *the least restrictive condition or combination of conditions of release*, and the court shall not set or impose any condition or combination of conditions of release greater than necessary to secure the appearance of the defendant at trial, or at any other stage of the criminal proceedings, or the safety of the community or other person, including but not limited to the crime victims and witnesses.

When considering the least restrictive condition or combination of conditions of release to set and impose, *the court shall first consider non-monetary conditions*. Should the court determine non-monetary conditions alone will not secure the appearance of the defendant at trial, or at any other stage of the criminal proceedings, or the safety of the community or other person, including but not limited to the crime victims and witnesses, then the court may consider monetary conditions or a combination of non-monetary and monetary conditions to satisfy the foregoing. After considering the defendant's ability to pay, a monetary condition fixed at more than is necessary to secure the appearance of the defendant at trial, or at any other stage of the criminal proceedings, or the safety of the community or other person, including but not limited to the crime victims and witnesses, is impermissible.

Rule 33.01(c) (emphasis added). As this Court knows, Mr. Kidd has been incarcerated continuously since May 22, 1996, and is without means of his own to

post a cash bail.

7. The standard non-monetary conditions of release include:

- (1) The defendant will appear in the court in which the case is prosecuted or appealed, from time to time as required to answer the criminal charge;
- (2) The defendant will submit to the orders, judgment and sentence, and process of the court having jurisdiction over the defendant;
- (3) The defendant shall not commit any new offenses and shall not tamper with any victim or witness in the case, nor have any person do so on the defendant's behalf; and
- (4) The defendant will comply fully with any and all conditions imposed by the court in granting release.

Rule 33.01 (b). There are additional non-monetary circumstances that the Court may impose if the Court finds them necessary to assure Mr. Kidd's appearance or assure the safety of the community, including, for example, that he report regularly to a designated person, agency, peace officer, or some officer of the court, that he observe a curfew, and that he maintain full time employment, that he obey all laws. Rule 33 spells out sixteen special conditions the Court may consider in setting appropriate conditions of pretrial release. *See* Rule 33.01(c)(1) through (16).

7. In Mr. Kidd's case, these factors weigh in favor of his release. Although he is accused of a serious crime, the evidence against Mr. Kidd is exceedingly weak. Mr. Kidd lived most of his life in Kansas City, he has supportive, law-abiding friends and family in the area, has maintained steady employment, and has never been

convicted of a serious crime.

8. Aside from the wrongful conviction which this Court has set aside, Mr. Kidd has never been convicted of a serious crime or any crime involving violence. He was placed on probation in Kansas City on a drug charge and immediately posted bail. He made all court appearances before pleading guilty in that case, and was in good standing with his probation officer when he was arrested in her office on May 22, 1996. He has no other conviction on his record.

8. If released, Mr. Kidd would reside with his sister, Nikki Kidd, at 2043 E 37th St., KCMO 64109. Ms. Kidd has been supportive of her brother throughout his prosecution and wrongful incarceration.

9. Due to more than twenty-three years of wrongful incarceration, Mr. Kidd is an indigent person, so counsel request that the Court give serious consideration to the express language of the rule presuming that a person such as Mr. Kidd who presents a low risk of flight be released on his own recognizance.

SUGGESTIONS IN SUPPORT OF MOTION FOR RELEASE

The language of Missouri Rule 33.01 directing that the accused “shall be entitled to be released pending trial” creates a presumptive entitlement to release. See, e.g., *United States ex rel. Barnwell v. Rundle*, 461 F.2d 768, 770 (3rd Cir. 1972), construing the nearly identical language of Fed. R. Crim. Pro. 23.01. Justice

Benjamin Cardozo explained the rationale of such a presumption:

It would be intolerable that a custodian adjudged to be at fault, placed by the judgment of the court in the position of a wrongdoer, should automatically, by a mere notice of appeal prolong the term of imprisonment, and frustrate the operation of the historic writ of liberty. "The great purpose of the writ of habeas corpus is the immediate delivery of the party deprived of personal liberty." * * * Certain it is, at least, that the writ may not be thwarted at the pleasure of the jailer. * * * Little would be left of "this, the greatest of all writs" * * * if a jailer were permitted to retain the body of his prisoner during all the weary processes of an appeal * * *.

People ex rel. Sabatino v. Jennings, 246 N.Y. 258, 158 N.E. 613, 63 A.L.R. 1458, 1459-1460 (1927).

Although the State of Missouri routinely seeks a writ of certiorari challenging a judgment granting habeas corpus relief, that "does not justify prolonging his imprisonment now that this Court has found that he was convicted in violation of his federal right to due process of law and must be tried again with due process, removing any presumption as of now that he is guilty as charged." *Cagle v. Davis*, 520 F. Supp. 297, 312 (N.D. Tenn. 1980). In *Cagle*, the district judge granting release pending the state's appeal of an order granting a writ of habeas corpus explained the appropriateness of such an order in terms quite applicable to Mr. Kidd's case. "Without this freedom, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting

counsel, searching for evidence, and preparing any available defense.” *Id.* The writ of habeas corpus dissolves and vacates the judgment of conviction of Mr. Kidd for first degree murder, and returns him to the status of a pretrial detainee. *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). The Court of Appeals, Western District, noted that “If a writ of certiorari was permitted to stay a writ of habeas corpus as to summarily prevent consideration of a motion for release pending further proceedings, Rule 91.14, which directs a court to set conditions of release pursuant to Rule 33 for a person in whose favor a writ of habeas corpus has been issued, would be rendered illusory.” *State ex rel. Koster v. McElwain*, No. WD73211, Order Granting Motion for Release Pending Further Proceedings, p. 5 (filed Dec. 13, 2010) (unpublished).

Were this a federal petition for writ of habeas corpus by a state prisoner, the Supreme Court acknowledges that “[t]here is presumption in favor of enlargement of the petitioner with or without surety” which may only be overcome “if the traditional stay factors tip the balance against it.” *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987). That presumption is not overcome where the record reflects “substantial evidence of [the petitioner’s] actual innocence,” and that the prisoner has already undergone trial and “lengthy post-conviction proceedings.” *Sanders v. Ratelle*, 21 F.3d 1446, 1461 (9th Cir. 1994). Further, Mr. Kidd’s lack of serious criminal history weighs in favor of his release at the present time.

The fact that Mr. Kidd is now a pretrial detainee on a first degree murder charge is no obstacle to release. Noting that "[t]he filing of an information charging a capital offense does not preclude release on bail," the Court of Appeals ordered Dale Helmig released pending further proceedings after the Honorable Warren McElwain granted the writ of habeas corpus based in part on proof that Mr. Helmig is innocent. *Koster v. McElwain, supra*, at 7, quoting *State ex rel. Thomas v. Crouch*, 603 S.W.2d 532, 537 (Mo. banc 1980) (citing Mo.Const. art I., section 20). The Court of Appeals Ordered Mr. Helmig released on bail, setting reasonable conditions, and remanded the case to the circuit court with directions "to enter such orders and to take such actions as are necessary to result in the immediate release of Petitioner Dale Helmig from incarceration at Crossroads Correctional Center in Cameron, Missouri, on his written promise to appear," and specifying conditions of release, which included a \$50,000 bond, authorizing ten percent deposit with the clerk of the court¹. *Koster v. McElwain, supra*, at 10.

Finally, there are no facts suggesting that Mr. Kidd presents a danger to society. Indeed there are none; Mr. Kidd has maintained an excellent conduct

¹ Counsel for Mr. Helmig advised the Court that Mr. Helmig's family had the means to post bail in that amount. Mr. Kidd's family and supporters are attempting to raise funds for bail, but counsel cannot at this time represent to the Court what amount of bail might assure Mr. Kidd's release. Counsel respectfully suggest that in light of the clear policy goals behind the recent revision to Rule 33, financial conditions for an actually innocent indigent defendant would be inappropriate.

record in the Missouri Department of Corrections, even though the terms of his sentence gave him no hope of release. All the factors which courts traditionally consider in determining release weigh in favor of allowing Mr. Kidd to be free during further proceedings herein.

Counsel for Mr. Kidd respectfully suggest that the issue of release in this case compares favorably with that in *Simpson v. Camper*, 743 F. Supp. 1342, 1353 (W.D.Mo. 1990), where the district court found “that petitioner does not pose a substantial risk of flight and that a surety is not required,” and released the habeas petitioner on her own recognizance. Ms. Simpson eventually prevailed in the Missouri courts, as is likely to be the case with Mr. Kidd. *Simpson v. Camper*, 974 F.2d 1030 (8th Cir. 1992). Like Ms. Simpson, Mr. Kidd is on the verge of being restored to freedom because this Court’s order presents him an opportunity to prove his innocence and win his freedom. Under Missouri law, his flight from the jurisdiction or failure to appear as directed would deprive him of the benefit of this court’s ruling. *State v. White*, 81 S.W.3d 561 (Mo. App. 2002). He will not squander that opportunity by fleeing or by violating any order of this Court setting conditions of release.

WHEREFORE, for the foregoing reasons, counsel for Mr. Kidd respectfully move this Court to enter its order releasing him on his recognizance pending further

proceedings, including his retrial, and to grant such other relief as the Court deems just and equitable.

Respectfully submitted,

/s/ Sean D. O'Brien

SEAN D. O'BRIEN, MoBar #30116
UMKC School of Law
500 East 52nd Street
Kansas City, MO 64110
(816) 235-6152; (816) 235-5276 (fax)

Cynthia M. Dodge MO Bar #47754
317 SW Market Street
Lee's Summit, MO 64063
(816) 246-9200; (816) 246-9201 (fax)
cindy@cdodgelaw.com

Rachel Wester, #67826
Midwest Innocence Project
3619 Broadway, Suite 2
Kansas City, MO 64111
(816) 221-2166; (888) 446-3287 (fax)
rwester@TheMIP.org

Attorneys for Petitioner

CERTIFICATE REGARDING SERVICE

I hereby certify that it is my belief and understanding that counsel for Respondent, Michael Spillane, is a participant in the Court's e-filing program and that separate service of the foregoing document is not required beyond the Notification of Electronic Filing to be forwarded on August 14, 2019 upon the filing of the foregoing document.

/s/Sean D. O'Brien
SEAN D. O'BRIEN
Counsel for Petitioner